

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NANCY SCOTT, Personal Representative of the  
Estate of JOHN SCOTT,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF CLINTON,  
CLINTON TOWNSHIP POLICE  
DEPARTMENT, OFFICER MICHAEL FRIESE,  
OFFICER MAJUR, OFFICER BURGESS,  
OFFICER SHERER, LIEUTENANT GERALD  
WHITE and SERGEANT POSAVETZ,

Defendants-Appellees.

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UNPUBLISHED  
September 27, 2002

No. 233266  
Macomb Circuit Court  
LC No. 96-002503-NO

Before: Meter, P.J., and Saad and R.B. Burns\*, JJ.

PER CURIAM.

Plaintiff, personal representative of decedent, John Scott, appeals as of right from the trial court's February 28, 2001 order granting summary disposition to defendants. We affirm in part, reverse in part and remand to the trial court for further proceedings consistent with this opinion.

**I. Facts and Procedural History**

This case arises out of the suicide of decedent John Scott in the Clinton Charter Township jail during the early morning hours of December 15, 1993. Clinton Township police officers arrested Scott during a domestic dispute and placed him in a jail cell following a videotaped booking procedure. Later that night, Scott committed suicide by hanging himself with the drawstring from his pants, which he tied around a portion of a heating or ventilation grate on the wall of his cell.

Plaintiff filed a complaint against the Township, its police department and individual police officers. Plaintiff alleged, among other claims, that (1) the Township and police department are liable for Scott's death under the public building exception to governmental immunity, (2) the individual police officers were grossly negligent for failing to properly monitor Scott, for failing to remove the drawstring from his sweatpants and for failing to obtain necessary

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

medical help, and (3) the officers were deliberately indifferent to Scott's medical needs under 42 USC §1983.<sup>1</sup> The trial court granted summary disposition to defendants on all plaintiff's claims and dismissed this case on February 28, 2001.

## II. Analysis

### A. Public Building Exception

Plaintiff alleges that the trial court erred in granting summary disposition to defendants because the Clinton Township jail cell was dangerous and defective and falls within the statutory public building exception to governmental immunity.<sup>2</sup> Specifically, plaintiff claims that the Township and police department breached their duties to properly design the jail cell to prevent an inmate from committing suicide, to build and maintain a cell without an exposed heating grate which constitutes a defective or dangerous condition, and to build and maintain a cell with an unobstructed view of inmates.

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<sup>1</sup> Plaintiff also asserted claims for nuisance, vicarious liability and common law assault and battery. However, plaintiff does not raise any claim of error regarding the trial court's dismissal of her nuisance and vicarious liability claims, and we deem those issues abandoned. Plaintiff raises the alleged laceration on Scott's head only in the context of her federal §1983 claims. Therefore, we decline to address her assault and battery claim as a separate issue.

<sup>2</sup> The trial court did not specify on which rule it relied in granting summary disposition on plaintiff's various claims. However, a review of the court's opinion and order indicates that the trial court relied on MCR 2.116(C)(7) in granting summary disposition on this issue. Our Supreme Court set forth the applicable standard of review for motions brought pursuant to MCR 2.116(C)(7) in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999):

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.

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MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity.

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A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. Moreover, the substance or content of the supporting proofs must be admissible in evidence. [ ] Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.

As our Supreme Court explained in *Brown v Genesee Cty Bd of Com'rs*, 464 Mich 430, 433-434; 628 NW2d 471 (2001) (plurality opinion), “[a]bsent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function.” See MCL 691.1407(1). It is well-settled that the operation and maintenance of a jail constitutes a governmental function for which a governmental agency is generally immune from suit. *Id.* “Although very broad, [governmental] immunity is subject to a limited number of narrowly drawn exceptions . . . including the public building exception, MCL 691.1406 . . . .” *Hickey v Zezulka*, 439 Mich 408, 420-421; 487 NW2d 106, reh den and amended 440 Mich 1203 (1992) (citation omitted). Under the public building exception, MCL 691.1406:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

As the plurality reiterated in *Brown*, the public building exception applies if the plaintiff demonstrates:

(1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Brown, supra* at 435, quoting *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998).]

In *Brown*, the plurality held that, though a jail is generally open to members of the public, to maintain a claim under the public building exception “the plain statutory language . . . requires that the party seeking relief be a member of the ‘public.’” *Brown, supra* at 435-436. The plurality unequivocally held that, for purposes of the public building exception, “[j]ail inmates are not members of the public . . . .” *Id.* at 439.

While plurality opinions are generally not binding on this Court, *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248-249; 570 NW2d 304 (1997), in his concurrence, Justice Markman agreed with the plurality’s conclusion that “a jail inmate is not a member of the public for purposes of the public building exception . . . .” *Brown, supra* at 440-442 (Markman, J., concurring). Thus, a majority of the justices agreed on this issue and we consider the holding in *Brown* dispositive.

Pursuant to *Brown*, plaintiff’s building defect claims fail as a matter of law. Scott, as an inmate at the Clinton Township jail, was not a member of the public for purposes of the public building exception. Accordingly, defendants are immune from suit for torts arising from Scott’s suicide based on their alleged negligent design and maintenance of the jail cell. MCL

691.1407(1). The trial court correctly granted summary disposition to defendants under MCR 2.116(C)(7), albeit for a different reason. *Washburn v Michailoff*, 240 Mich App 669, 678 n 6; 613 NW2d 405 (2000).

### B. Gross Negligence

Plaintiff asserts that the trial court erred in granting summary disposition to the individual police officers on her gross negligence claims because (1) the trial court improperly relied on *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) in finding that the officers' actions were "the" proximate cause of Scott's injuries; and (2) plaintiff set forth sufficient facts to show that the officers were grossly negligent for refusing to obtain medical treatment for Scott, for disobeying department policies on how to treat suicidal inmates, and for failing to find and remove the drawstring on Scott's pants.

Under the employee provision of the governmental immunity act, MCL 691.1407(2), as quoted in *Robinson*, *supra* at 458:

Each ... employee of a governmental agency ... shall be immune from tort liability for injuries to persons or damages to property caused by the ... employee ... while in the course of employment ... while acting on behalf of a governmental agency if all of the following are met:

(a) The ... employee ... is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The ... employee's ... conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Here, while the trial court ruled that, based on the assertions in plaintiff's complaint and the booking transcript, reasonable minds could differ on whether the officers acted negligently or grossly negligently in failing to handle Scott as a potential suicide risk, the court granted summary disposition to defendants because the officers' actions (or inaction) were not "the" proximate cause of Scott's injuries. Rather, the court ruled that "the" proximate cause was Scott's "own decision to hang himself."

In *Robinson*, our Supreme Court overruled *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), "to the extent that it interpreted the phrase 'the proximate cause' in subdivision (c) to mean 'a proximate cause.'" *Robinson*, *supra* at 458. The *Robinson* Court reasoned that "[t]he Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause." *Id.* at 458-459. Therefore, the Court clarified that "[t]he phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Id.* at 459.

The parties do not dispute that Scott committed suicide while he was alone in his cell by

tying the drawstring around a heating vent and hanging himself. Therefore, it is undisputed that the “one most immediate, efficient, and direct cause preceding [his] injury” was Scott’s act of hanging himself.

It is well-settled that, “[i]f the facts bearing upon proximate cause other than causation in fact are not in dispute and if reasonable minds could not differ about applying the legal concept of proximate cause to those facts, then the issue is one for the court.” *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995). The trial court correctly granted summary disposition to the defendant officers because, as a matter of law, plaintiff failed to set forth facts to show that the officers acts were “the” proximate cause of Scott’s injuries under *Robinson, supra*.<sup>3</sup> Accordingly, plaintiff’s claim is barred by governmental immunity. MCL 691.1407(2); MCR 2.116(C)(7).<sup>4</sup>

### C. 42 USC §1983 Claim

Plaintiff contends that the trial court erred in granting summary disposition to defendants on her federal claims under 42 USC §1983 because defendants failed to meet their burden of producing evidence to support their motion under MCR 2.116(C)(10). We agree.

Though the trial court did not state on which rule it relied in granting summary disposition to defendants, it is clear from its opinion and order that it decided this part of the motion under MCR 2.116(C)(10). The trial court considered evidence submitted by plaintiff, including the booking transcript and the police department’s policy and procedure manual. The trial court concluded that, while evidence showed that Scott “arguably expressed suicidal ideations,” the police officers’ “actions did not rise to the level of deliberate indifference to Scott’s health or safety.”

When judgment is sought under MCR 2.116(C)(10), the moving party must submit “[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion . . . .” MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Moreover, under MCR 2.116(G)(4):

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.

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<sup>3</sup> Plaintiff argues that *Robinson* does not apply because it involved a high-speed police chase, not a jail suicide. However, these factual differences do not alter the Supreme Court’s plain reading of MCL 691.1407(2)(c) and plaintiff gives no persuasive reason why the statute should be interpreted differently under these facts.

<sup>4</sup> In their motion, defendants moved to dismiss plaintiff’s gross negligence claim under MCR 2.116(C)(10), but argued that plaintiff’s claims against the officers are barred by governmental immunity. As discussed below, defendants did not properly support a motion under MCR 2.116(C)(10) because they failed to submit documentary evidence. However, because plaintiff’s claim is clearly barred by governmental immunity, summary disposition was properly granted under MCR 2.116(C)(7). “An order granting summary disposition under the wrong court rule may be reviewed under the correct rule.” *Shirilla v City of Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

When a motion under subrule (C)(10) is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment if appropriate, shall be entered against him or her. [Emphasis added.]

In other words, unlike the permissive language regarding the submission of supporting documents under MCR 2.116(C)(7), if the moving party fails to support his motion under (C)(10), judgment is inappropriate and the non-moving party “ha[s] no duty to respond to the motion.” *Meyer, supra* at 575. The trial court erred by granting defendants’ motion on this issue because defendants failed to submit documentary evidence to support it.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Robert B. Burns